No. 10300

In the United States Circuit Court of Appeals

For the Ninth Circuit

PHILLIP SUETTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Appeal from a Judgment of Conviction in the District Court of the United States for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND

INDEX

CASE INDEX

CASE INDEX

STATUTES

TEXTS

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STATEMENT OF FACTS

The defendant, Phillip Suetter, was indicted by the Grand Jury for the District of Oregon on the 23rd day of May, 1942, and charged, in an indictment containing seven counts, with the violation of Section 77q(a)(2) of Title 15, U.S.C.A. and Section 338, of Title 18, U.S.C.A. Counts one and two of the indictment charged a violation, by the defendant, of Section 338 of Title

18, U.S.C.A., which said counts charged the defendant with the use of the United States Mails in furtherance of a scheme, or artifice to defraud, hereinafter referred to as the "Mail Fraud" counts; counts three to seven, inclusive, charged the defendant with the sale of securities and the use of communications in interstate commerce, in furtherance of a scheme or artifice to defraud, under section 77q(a)(2) of Title 15, U.S.C.A., hereinafter referred to as "Securities" counts.

The particular code sections alleged to have been violated read as follows:

> "Section 338, Title 18, U.S.C.A.; Using Mails to Promote Frauds; Counterfeit Money.
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through any correspondence, by what is commonly called the 'sawdust swindle', or 'counterfeit money fraud', or by dealing or pretending to deal in what is commonly called 'green articles', 'green coin', 'green goods', 'bills', 'paper goods', 'spurious Treasury notes', 'United States goods', 'green cigars', or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting to do

so, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any postoffice, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

"Section 77q, Title 15, U.S.C.A.; Fraudulent interstate transactions.

"(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading or * * *."

The particular allegations of the act comprising the "Scheme or Artifice to Defraud" alleged in the indictment (Rec. pp. 4, 5, 6, 7, 8, 9, 10, 11) are re-alleged by reference, and referred to in each count. Thus the

United States has alleged but one "Scheme or Artifice to Defraud" as the basis for each and all of the seven counts in the indictment.

The indictment alleges that the defendant, Phillip Suetter, did, between the 15th day of January, 1934, and, continuously thereafter, up to and including the 30th day of June, 1941, devise and intend to devise, a certain scheme and artifice to defraud, and for obtaining money and property, by means of false and fraudulent pretenses, representations and promises, from a certain class of persons (Rec. pp. 3, 4).

The evidence adduced by the United States, at trial, showed that the defendant was the owner of certain mining property in Josephine County, Oregon. It was further proved, by the testimony of Ralph T. Montag, government witness, that Suetter was associated with the Montag in the operation of the mining properties and that Montag had advanced considerable capital, and was, in fact, a silent partner (Rec. pp. 83, 85, 86, 87).

Montag, as security for the money advanced to Suetter, had taken a mortgage on the mining property and was advancing necessary expense money to Suetter in the operation of the mines (Rec. pp. 59, 60). Montag was fully advised as to Suetter's actions in regards the property and his efforts to finance the development of the property, and his activities and efforts to raise money in Chicago and elsewhere. (Rec. pp. 86, 87; Govt's Exhibits 7, 8, 9, 10, 12, 13, 14, 17).

At the close of the examination of Ralph T. Montag, who was one of the persons alleged to have been defrauded, that witness, in answer to certain questions propounded by the Court, answered as follows: (Rec. pp. 86, 87).

"COURT: Mr. Montag, as I gather from your testimony, you at all times knew what was going on?

A. Yes. No, I won't say I knew all.

COURT: I mean, you knew most—

A. Yes.

COURT: —of what was going on, and by your letters you showed—by the letters you received from Mr. Suetter and some of his replies, he was trying to account to you for the progress of the—I call it the exploitation of the mine—the working of the mine?

A. Yes.

COURT: And while you were furnishing the money he tried to give you an account every week, or every so often, as to where the money went; is that correct?

A. No, not quite that way. He would tell me at times.

COURT: He would tell you at times?

A. Yes.

COURT: Because you were always kicking, that you didn't want to put in any more money; isn't that the idea?

A. Yes.

COURT: Then after he went east you have already stated you knew he went there to raise money?

A. Yes.

COURT: In other words, you are not complaining that Mr. Suetter in any way misrepresented anything to you in order to get your money, are you?

A. No, I don't claim that."

The testimony of the witness, William Phillips, sales engineer for Link-Belt Company, and one of the persons alleged to have been defrauded, was, to the effect, that he had made a personal investigation of the property and had made a test of the ground as to metallic content, and found the tests "very satisfactory." (Rec. p. 108) There was also proof that Phillips had recommended the property to Archbishop Beckman and to others. (Def. Ex. 46, Record, p. 110). Phillips further stated that his independent tests showed that Suetter had not exaggerated in any way and that the statements made by Suetter in regards the gold content of the property were "very conservative". (Def. Ex. 46). The further evidence from Phillip's testimony was that employees of the Link-Belt Company had invested in units in the Suetter Placer Mines, relying on the tests made by their Company, and that after there had been a cancellation by the Link-Belt Company of a contract for purchase of equipment by Suetter, both the employees of Link-Belt Company, who had invested with Suetter, and Phillips were still favorably interested in the property as investors. (Rec., p. 115) In regard to the value of the property, and as to whether or not the units were a good investment, Phillips testified: (Rec., pp. 115, 116)

> "Q. You testified Suetter said he would like you to have four more units because they were a good investment?
>
> A. That is right.
>
> Q. As a matter of fact you told Suetter they were a good investment, didn't you?
>
> A. I believed that."

Phillips also testified that he had shown moving pictures of a dredge in operation similar to one that Suetter proposed to buy from Link-Belt Company for $250,000, and that said motion pictures were shown at the Stevens Hotel in Chicago in the presence of Archbishop Beckman and eight or ten other priests. (Rec., pp. 101, 102) There was also testimony by Phillips that he had supplied Suetter with a photographic cut of a gold dredge, and it was used on the heading of the Trust Units; that Phillips had seen the photographic cut used on the printed stock certificates or units, on January 2, 1937, shortly after the certificates or units were printed, and made no protest as to the use of said photographic cut by Suetter for such purpose, and that, prior to January 2, 1937, Suetter had no units or stock certificates and had offered none to Phillips. Phillips' testimony also revealed that he considered himself the owner of units in the Suetter Placer Mines, although the only thing of value Phillips had ever parted with was a promissory note to Suetter, which note had been returned to him by Suetter in Chicago. (Rec., p. 117)

Reverend Steven A. Bubacz, one of the persons alleged in the indictment to have been defrauded, testified that the money he had advanced to one, Ed Hogan, had been advanced on Hogan's representation that he, Hogan, was the owner of the Josephine Mines. His testimony was also to the effect that several months after the advance of the money to Hogan he met the defendant, Phillip Suetter, and that Suetter informed Rev. Bubacz, at that time, that Hogan was not the owner of

the properties. Father Bubacz' testimony also established the fact that Suetter had never sold any Units to Bubacz or made any representations to Bubacz as to the value of the property in any effort to obtain anything of value from Bubacz, but that Suetter had given to the witness, Father Bubacz, shares, or units, in the Suetter Placer Mines, without consideration, in an effort to rectify the misstatements made by Hogan. (Rec., p. 121) Father Bubacz also testified that he had arranged for the defendant, Suetter, to meet both Bishop Rhode and Archbishop Beckman. (Rec. p. 122) In regard to the telegram charged by the United States as being the basis for Count Five of the indictment, Bubacz testified that it related to the terms of a settlement between Suetter and Archbishop Beckman and had no reference to any sale or offer of securities or any other transaction. (Rec. p. 122) Bubacz also testified that he had discussed the mines and their potential values with William Phillips, of the Link-Belt Company, and with Archbishop Beckman, and that he had knowledge of the results of the independent tests made by Phillips and the Link-Belt Company. (Rec. p. 123)

The testimony of Bishop Paul P. Rhode was that he had met Suetter in Green Bay, Wisconsin, in 1937, and, on the occasion of his very first meeting with Suetter he offered and gave Suetter $5000, for five units in the Suetter Placer Mines. (Rec. p. 123) Bishop Rhode testified the reason being that he had previously discussed the mines with Father Bubacz on at least two occasions (Rec. pp. 128, 131) before he had met

Suetter, and that the basis of his last investment of $2000 was the recommendation of Archbishop Beckman, after the latter had visited the mines in the spring of 1939. (Def. Ex. 73). Bishop Rhode testified that he knew Archbishop Beckman was interested in the property, from a conversation with Father Bubacz that had taken place sometime before Bishop Rhode had met the defendant, Suetter, and that he also knew that Phillips, the engineer of the Link-Belt Company, was interested in, and that he had personally invested in the mines. (Rec. pp. 134, 135)

Bishop Rhode testified, also, that Suetter had never displayed any mining reports or engineer's reports to him, but had only shown him a bottle of gold dust, and had talked about the property and the possibilities of gold recovery by the use of proper equipment, only in a general way. (Rec. pp. 136, 137) In relation to the extent of the discussion of the properties with Archbishop Beckman, Bishop Rhode acknowledged writing a letter to Suetter commending him for his work on the mines. (Def. Ex. 73, Rec. pp. 154, 155, 156), Bishop Rhode also testfied that he had commenced a civil action against Suetter to recover the money he had invested, and had dismissed the civil action against Suetter upon the promise of Archbishop Beckman that "I will take care of you"; that he knew about the lawsuit between Archbishop Beckman and Suetter and that he had been offered by Father Bubacz, 84 shares of stock in the "Hercules Mining Corporation", a company formed by Archbishop Beckman to operate the

properties ,in exchange for Rhodes' units or interest in the Suetter Placer Mines. (Rec. pp. 157, 158, 159) Bishop Rhode also stated that he still maintained an interest in the Suetter Placer Mines.

At the conclusion of his examination by counsel, a juror propounded the following question to Bishop Rhode:

> "THE JUROR: Where did you get your competence and all to invest thirty thousand dollars through Mr. Suetter?"
>
> A. I largely took that step on my own responsibility, *trusting what I heard in regard to Mr. Suetter,* and later on learning that the charges which had been preferred against him in Indiana and Illinois, I believe, had not been sustained, that he was declared innocent, I think, or at least exonerated. And what I learned from time to time from Mr. Suetter as he went along, because for a long time there was no trouble whatsoever, everything seemed to go along in a normal and satisfactory way, until the unfortunate break took place, and so I assumed full responsibility for the investment which I had made." (Rec., pp. 164, 165) (Italics ours.)

The testimony of Archbishop Francis J. Beckman, one of the persons alleged to have been defrauded, was to the effect that before he made any investment with Suetter he had discussed the properties and their potential value with Phillips, of the Link-Belt Company, and that he had been informed by Phillips of the results of the independent tests made by Phillips and by the Link-Belt Company, some of these tests having been made, unknown to Suetter. (Ex. 46, Rec. p. 110) (Govt. Ex. 43, Rec. p. 102). His further testimony was

that he had received the first two units in the Suetter Placer Mines for money advanced to Ed Hogan before he had met Suetter. The evidence disclosed that Archbishop Beckman advanced approximately $59,000.00 in cash and that he executed his promissory notes, and notes on the Archdiocese of Dubuque (Catholic), in the sum of $253,750, payable to the order of the defendant, Suetter, as of May 14, 1938; that he had, subsequent to that time, between May 20, 1938 and March, 1939, advanced to Suetter $40,000 in cash. (Rec. p. 172). The further testimony of Archbishop Beckman was to the effect that he had visited the property and made a personal inspection thereof, the last of said trips being in the spring of 1939.

The evidence disclosed that Beckman had first issued promissory notes to Suetter bearing only the signature of Francis J. Beckman, but that, some time later, the notes were changed to read "The Archdiocese of Dubuque, Iowa, by Francis J. Beckman, Archbishop." (Rec., pp. 184, 185) It was also shown that in March, 1938, Suetter executed an additional agreement with Beckman regarding the properties (Gov. Ex. 79) but that Beckman was not satisfied with such agreement because there were others interested in the properties besides Suetter and Beckman, and he insisted that a new agreement be drawn giving to Archbishop Beckman 60% interest in the property and allowing Suetter a 40% interest. (Rec. pp. 188, 189) Archbishop Beckman's testimony further showed that he had visited the property in February, 1939, and, at that

time, all of the properties were in operation,, although little gold recovery was then being made. (Rec. p. 189)

The cross-examination of Archbishop Beckman revealed that he met Suetter at the Stevens Hotel in Chicago, and had inspected moving pictures displayed by the witness, Phillips, of the Link-Belt Company, and that he had discussed the properties with Diax, the Archbishop's personal mining engineer, who stated that the properties had not been properly tested; that he had also, personally, discussed the property with Phillips who favored the venture. (Rec. p. 183) ; that there was also a discussion, at that time, as to the type of machinery that would be needed. (Rec. p. 184) Archbishop Beckman's further testimony was that, although he knew, at the time of execution of Exhibit 79, agreement, in March, 1938, that Bishop Rhode, Father Bubacz and Ralph Montag were all interested in the properties, he, Archbishop Beckman, demanded 60% control of the properties stating that he felt that he had put in by far the most money. (Rec. p. 188) Beckman also testified that he continued to invest in the properties after he knew of the existence of Ralph Montag's interest and that the accounting contained in Govt. Exhibit 82 showed that Beckman had executed $253,750, in promissory notes and made an agreement as to the division of interest in the properties as between Beckman and Suetter. (Rec. p. 188) In regard to his visits to the mines, Beckman testified that he had visited and inspected them, first, in February, 1939, again in the early part of May, 1939, and again,

in the latter part of May, 1939. Archbishop Beckman stated that he knew that Suetter was "bungling" but that he believed in his honesty and believed that Suetter had a legitimate enterprise. (Rec. p. 189) He stated that he had written Defendant's Exhibit 97 after his first visit in 1939 and at that time everything was going "full blast" and "it looked awful good to me".

Archbishop Beckman testified that he had written Def. Ex. 98 on May 14, 1939, and that prior to that time, February 11, 1939, he had obtained from Suetter an agreement whereby Suetter had transferred 60% interest in the mines to Archbishop Beckman. (Rec. pp. 190, 191, 192).

Archbishop Beckman's further testimony was to the effect that he had placed a personal representative on the properties, one Monsignor O'Laughlin, who later filed on June 1, 1939, a civil action, as the Archbishop's agent, against Suetter for an accounting and to enjoin Suetter from operating the properties, and that the suit was settled by Suetter turning over, to Archbishop Beckman, $171,250 of the promissory notes of the Archbishop, and by turning over all of the mining properties, except the Josephine mines, to Archbishop Beckman, and turning over all of the equipment thereon; that Archbishop Beckman then agreed to pay Suetter $20,000 and to assume any claims of Bishop Rhode and Father Bubacz. (Rec. pp. 193, 194) The $20,000 had not, at the time of trial, been paid, and Archbishop Beckman, and others were, without Suetter, operating the other properties under the name of

"The Hercules Mining Corporation".

An accounting prepared by I. R. Perry from the records of the Suetter Placer Mines was offered by the United States, being Exhibit 104, showing expenditures by Suetter of $301,644.14, as of April 30, 1939, and showing that the defendant, Phillip Suetter, and his wife, Anna Suetter, had received the sums of $40,955.65 and $2,250.09 respectively. Perry testified that the accounting or trial balance was made from cancelled checks, original invoices, letters and other information supplied by the defendant Suetter and that it was a correct summary of the records supplied. (Rec. pp. 196, 197, 198, 199, 200).

At the close of the case for the United States, defendant, through his counsel, moved the Court for an Order dismissing the charges against the defendant on the ground, and for the reason, that the United States had failed to prove any fraud, or fraudulent scheme or artifice to defraud on the part of the defendant Suetter and that the United States had failed to sustain its case. This motion was, then and there, denied by the Court, to which ruling the defendant, by his counsel, then excepted. (Rec., p. 203).

The defendant, Phillip Suetter, thereupon, was called as a witness in his own behalf and his testimony was, that prior to 1927 he was engaged in the business of trading horses and livestock in Portland, Oregon. He testified that in the depression years of 1930-33 he had lost everything and had gone bankrupt in 1933.

After the bankruptcy, he had gone to Southern Oregon and taken up a mining claim, and that he later secured an option on the Josephine mines, then owned by Judge Norton, in June, 1934. (Rec. p. 204) The defendant Suetter admitted having sent the letters and used the other means of interstate communications, but denied any scheme to defraud.

The cross-examination revealed that Suetter had met Ed Hogan in Grants Pass, Oregon, and that the latter had approached Suetter and agreed to raise money for him to develop the Josephine Mines, after Ralph Montag had stated he was unable to invest further. The testimony of Suetter was to the effect that he had supplied Hogan with a car and certain expense money and that Hogan was to receive 20% commission on any money raised and 5% interest in the mines. (Rec. p. 207). Suetter also testfied that he had gone to Chicago seven or eight months after Hogan had left, to check up on Hogan, who had stopped reporting to him, and learned at that time that Hogan had apparently misrepresented the ownership of the mines to Father Bubacz and to Archbishop Beckman, who had both advanced some money to Hogan. (Rec. p. 208) The evidence further disclosed that Suetter was in constant communication with Ralph Montag about his activities and efforts to raise money for equipment and the development of the mines. (Rec. pp. 208, 209, 210, 211, 212, 213, 214, 215.) (Govt's Ex. 112, 113).

Suetter had also informed Montag of the type and cost of machinery declared to be necessary by the Link-

Belt people in order to develop and operate the properties. (Govt. Ex. 114) In regard to his assets at the time of the exercise of his option to purchase the Josephine Mines from Judge Norton, Suetter testified that Ralph Montag had put up a considerable portion of the money invested and that he, Suetter, had also borrowed from friends and his wife the balance invested; that he had made some recovery of gold which was used to meet expenses of operation. Suetter also testified that he, in fact, was the owner of the Josephine Mines, and that Ralph Montag did not want his name publically identified with any mining operation. (Rec. p. 219). In regard to the settlement of the civil lawsuit by Bishop Rhode, Suetter testified that the matter had been taken care of by Archbichop Beckman according to the Archbishop's prior agreement with Suetter (Rec. p. 220, 221), and that this settlement with Rhode was about a year after Suetter had settled with Archbishop Beckman. Suetter also testified that he had received a check for $2,000, from Bishop Rhode after July 27, 1939 for the former purchase of two units in the Suetter Placer Mines based on a prior agreement by Bishop Rhode to purchase the Units. (Rec. p. 221)

The case was submitted to the jury under proper instructions by the Court, and a verdict returned finding the defendant "Not Guilty" as charged in Counts One, Two, and Five of the Indictment, and "Guilty", as charged in Counts Four, Five, Six, and Seven, with a recommendation of leniency. Thereupon the defendant, through his counsel, petitioned the Court for a

New Trial on the grounds that the Verdict of the jury in finding the defendant "not guilty" of the violation of the Mail Fraud Counts was inconsistent with their finding him "guilty" on the Securities Act Counts, as each required fraud on the part of the defendant, and only one scheme had been alleged in the indictment, and on the further ground that the Court had erred in allowing certain evidence to be admitted over the objection of the defendant and in refusing to require the United States to elect or designate as to which charge or charges in the indictment the evidence was directed. After hearing on said motion for a New Trial, the Court allowed the same as to the conviction on Counts Three and Four (involving Archbishop Beckman, holding he was a partner), and dismissing the convictions against the defendant as to those counts, but disallowed said motion for a New Trial and Dismissal as to counts Six and Seven (involving Bishop Rhode). (Rec. pp. 41, 42, 43, 44)

ASSIGNMENT OF ERRORS

POINTS AND AUTHORITIES

1. The Court erred in failing to grant the defendant's motion for dismissal at the close of the case for the United States.

Beckman v. United States, 96 Fed. (2d) 15.
Securities and Exch. Comm. v. Macon, 28 Fed. Supp. 127.
U.S.C.A., Title 15, Section 77q.
Black's Law Dictionary, Second Edition, p. 521.
28 C.J. 1062.

2. There is no evidence to support the verdict of the jury.

U.S.C.A., Title 15, Sec. 77q, page 463.
Beckman v. United States, 96 Fed. (2d) 15.

3. The Court erred in admitting into evidence, over the objection of the defendant, Government's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 36, 37, 38, 40, 42, 57, 67, 79, without requiring the United States to designate, or elect, as to which charge, or charges, in the indictment the evidence was directed.

Jarvis v. United States, 90 Fed. (2d) 243.
Coplin v. United States, 88 Fed. (2d) 652; 57 S. Ct. 929, 81 L. Ed. 1357.

4. The Court erred in failing to set aside the verdict of Guilty on Counts Six and Seven and in failing to dismiss the indictment, for the reason that the jury, in finding the appellant Not Guilty on Counts One and Two, a fortiori, found appellant not guilty of the crime charged in the indictment, there being only one alleged scheme to defraud, and the verdict was therefore inconsistent.

Speiller v. United States, 31 Fed. (2d) 682.
Boyle v. United States, 22 Fed. (2d) 547.
Macklin v. United States, 79 Fed. (2d) 756.
Coplin v. United States, 88 Fed. (2d) 652.
Dunn v. United States, 284 U.S. 390, 82 S. Ct. 189, 76 L. Ed. 356.
Freeman v. United States, 96 Fed. (2d) 13, 59 S. Ct. 78, 83 L. Ed. 377.
People v. Doxey, 93 Pac. (2d) 1068.
People v. Hickman, 31 Cal. App. (2d) 4, 87 Pac. (2d) 80.

Commonwealth v. Kline, 107 Pa. Sup. 594, 164 A. 124.
People v. Andrasky, 75 Cal. App. 16, 241 Pac. 591.
People v. Herrigan, 218 Mich. 235, 187 N.W. 306.
23 C.J.S., Par. 1403, pp. 1094, 1095.

ARGUMENT

POINT 1

The Court erred in failing to grant defendant's Motion for dismissal.

At the close of the case for the United States the defendant, through his counsel, seasonably moved the Court for a dismissal of all of the charges contained in the indictment, on the ground that the United States had failed to prove that there was any scheme, or artifice to defraud, on the part of the defendant, or that he had sold any securities to anyone as a result of any false statements made by him.

We need here consider only the effect of any statements made by the defendant, Suetter, to Bishop Rhode pursuant to some scheme to defraud. The charges as to the others have been disposed of either by the acquittal or by the dismissal by the Court upon the motion and allowance of a New Trial.

A review of the testimony of Bishop Rhode shows that he had discussed the mines, the trust agreement, and the units with Father Bubacz on at least two occasions before he had even met the defendant, Suetter, and that he had knowledge of the mines and of who

else was interested. (Rec. pp. 128, 131, 134, 135, 164). Bishop Rhode's testimony also brought out the fact that he had knowledge that William Phillips, sales engineer for the Link-Belt Company, and Archbishop Beckman were investing personally in the mines from his conversations with Father Bubacz before he had even met the defendant, Suetter, and that on the occasion of his very first meeting with Suetter Bishop Rhode had invested $5,000 in the Suetter Placer Mines for five Units. (Rec. p. 123). He also stated that the basis of his last investment of $2,000 was statements made by Archbishop Beckman after the latter had visited the properties in the spring of 1939. (Rec., p. 156) The summation of his testimony regarding the reasons for his investments of $30,000, with Suetter, is in the response to the fololwing question by a juror:

> "JUROR: Where did you get your competence and all to invest thirty thousand dollars through Mr. Suetter?
>
> A. *I largely took that step on my own responsibility, trusting what I heard in regard Mr. Suetter,* and later on learning that the charges which had been preferred against him in Indiana and Illinois, I believe, had not been sustained, that he was declared innocent, I think, or at least exonerated. And what I learned from time to time from Mr. Suetter as he went along, because for a long time there was really no trouble whatsoever, everything seemed to go along in a normal and satisfactory way, until the unfortunate break took place, and so I assumed full responsibility for the investments which I made." (Rec. pp. 164, 165). (Emphasis ours.)

The basis of the charges upon which the defendant was convicted is contained in Section 77q, of Title 15, U.S.C.A.: Fraudulent Interstate Transactions. In order to sustain its case, the United States was called upon, in the first instance, to prove some scheme, or artifice to defraud by the defendant Suetter. There are a great many definitions of fraud and fraudulent transactions. It has been defined as follows:

> "Fraud consists of some deceitful practice or wilful devise, resorted to with intent to deprive another of his right, or in some manner do him an injury. As distinguished from negligence, it is always positive, intentional". Black's Law Dictionary, Second Edition, p. 521.
>
> "It may be stated generally that the elements of actionable fraud consist of: (1) A representation. (2) Its falsity. (3) Its materiality. (4) The speaker's knowledge of its falsity or ignorance of the truth. (5) His intent that it should be acted upon by the person and in the manner reasonably contemplated. (6) The hearer's ignorance of its falsity. (7) His reliance on its truth. (8) His right to rely thereon. (9) And his consequent and proximate injury." 26 Corpus Juris 1062.

In this case there is absolutely no proof that Bishop Rhode made any purchase of units from Suetter in reliance upon any statements or representations made by the defendant Suetter. On the contrary, the evidence shows that Bishop Rhode discussed the mines with Father Bubacz and with others, particularly Archbishop Beckman, and the information so obtained was the basis of Bishop Rhode's investment. The statements of Bishop Rhode clearly show that he had knowl-

edge of the properties, and he stated in his testimony that he had made his initial investment of $5,000 the first time he ever met the defendant, Suetter, and that prior to that time he had discussed the mines with Father Bubacz and possibly others. (Rec. pp. 128, 132, 133, 134, 135). He also testified that at this first meeting he had only discussed the properties generally and that Suetter at no time had shown him any engineer's reports or purported engineer's reports. (Rec. pp. 127, 128).

The important point of the charges against the defendant was not that he had obtained money or property and sold units or securities by the use of the mails or other means of interstate commerce, but that such means were used "to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary, in order to make the statements made, in the light of the surrounding circumstances under which they were made, not misleading".

In this case we have neither proof of any untrue statements made by the defendant, nor any withholding by the defendant of any material fact from Bishop Rhode. As already pointed out, the witness, Bishop Rhode, testified that he had made his investment originally on information he had received from Father Bubacz, and his final investment of $2,000 (upon which the charges in the indictment are based) upon information supplied by Archbishop Beckman. Therefore there was a complete failure of proof as to any fraud

or false representations on the part of the defendant. Suetter, or any withholding by him of any material fact and the charges should have been dismissed.

POINT 2

There is no evidence to support the verdict of the jury.

ARGUMENT

As heretofore pointed out in Point One, in the absence of any proof by the United States of fraud, or scheme or artifice to defraud, the government has failed to maintain its case. The jury could not have found the defendant guilty of the charges unless there was some proof that the witness, Bishop Rhode, had been defrauded by the defendant Suetter.

The rule has been stated generally that:

> "Where guilt in a prosecution for using the mails to defraud, violating this section and a conspiracy rest upon circumstantial evidence, government has burden of proving its case *not only beyond a reasonable doubt, but to the exclusion of every reasonable hypothesis of innocence*" (U.S. C.A., Title 15, Sec. 77q, page 463, citing Beckman v. U. S., 96 Fed. (2d) 15). (Italics ours.)

The testimony of Bishop Rhode shows conclusively that he invested with the defendant on its own responsibility trusting what he had heard about Mr. Suetter from other churchmen, priests, the Archbishop and others. (Rec., pp. 164, 165). The statements or

opinions of others regarding the mines, not made by the defendant, Suetter, would not be chargeable to him. Therefore, there is no proof that any money obtained from Bishop Rhode by the defendant, Suetter, was the result of any false or fraudulent statement made by Suetter, nor is there any evidence that anything was withheld from Bishop Rhode by Suetter.

As further proof that there was no fraud on the part of the defendant, Suetter, and that the money invested was spent as agreed, we refer to Government's Exhibit 104. This trial balance shows that Suetter had expended at least $258,438 on equipment and in the operation and development of the mines, and that he had received, prior to June 30, 1941, $19,000 from Ralph T. Montag (Government's Exhibit 16), $30,000 from Bishop Rhode, (Government's Exhibit 64), and $181,000 from Archbishop Beckman, (Government's Exhibits 79, 83 (Rec. pp. 167, 177) or a total of $231,400.00. The trial balance shows an expenditure by Suetter of $27,938.00, over and above the investments made, of his own money, in the purchase of equipment and in the operation of the mines, and that none of the money entrusted to him by the investors in the Suetter Placer Mines was used for his own benefit or for any other purpose than that intended and agreed upon in the Agreement of Trust. We therefore submit that there was a total lack of proof of any fraud on the part of the defendant, Suetter, and there is no evidence to support the judgment of conviction.

POINT 3

The Court erred in admitting into evidence, over the objection of the defendant, certain evidence without requiring that the United States elect, or designate, as to which charge, or charges, in the indictment, such evidence was directed.

ARGUMENT

The rule that the United States may be compelled, by proper objection by the defendant, to elect, or designate, as to which charge, or charges in the indictment certain evidence is directed, has been expressed as follows:

> "The trial judge followed the customary method of admitting any evidence which bore on either indictment, *leaving to the defendants to ask to have any particular piece of evidence limited if they thought it should be.*" (Italics ours.)

Jarvis v. U. S., 90 Fed. (2d) 243.

The same rule was laid down as follows:

> "As the appellants themselves pointed out in the court below and in their brief here, the check in question is the one described in Count IV of the indictment, on which count all of the defendants were acquitted. The defendants objected that there was no showing that any of them had mailed the check, but, when the court overruled that objection, *they did not ask that the jury's consideration of the check should be limited to Count IV, and disregarded as to Count IX.*" (Italics ours.)

Coplin v. U. S., 88 Fed. (2d) 652; 57 S. Ct. 929, 81 L. Ed. 1357.

As heretofore pointed out, more than twenty-six exhibits were admitted; over the objection of the defendant, without requiring the United States to elect or designate as to which charge, or charges, in the indictment the same were directed. Certainly, nothing contained in any of the Exhibits identified by the witness, Ralph Montag, would have any tendency to prove the charges in the indictment, for Montag testified that he knew at all times what was happening in respects the mines. (Rec. pp. 86, 87) Montag never was a purchaser of any units in the Suetter Placer Mines, but was a silent partner with the defendant, Suetter, in the operation of the mines. (Rec. p. 83) As to the testimony of William Phillips and Father Steven Bubacz, the evidence discloses conclusively that they had made no investment with Suetter. The evidence shows conclusively that Phillips made an independent investigation of the mining properties and that he, Phillips, had recommended the mines as a good investment, not only to Archbishop Beckman, Father Bubacz and others, but had also made the same recommendations to the defendant, Suetter. (Govt.'s Ex. 43, Def. Ex. 46, Rec. pp. 102, 110).

We therefore submit that there was error in the admission, over proper objection, of the exhibits without requiring the United States to designate, or elect, as to which charge, or charges, in the indictment the same were directed.

POINT 4

The Court erred in failing to set aside the verdict of Guilty on Counts Six and Seven and dismissing the indictment, for the reason that the jury, in finding the appellant Not Guilty on Counts One and Two, a fortiori, found appellant not guilty of the crime charged in the indictment, there being only one alleged scheme to defraud, and the verdict was therefore inconsistent.

ARGUMENT

There are two lines of authority in regard to inconsistencies in Verdicts by a Jury, reported in the Federal Cases. Speiller v. U. S., 31 Fed. (2d) 682 and Boyle v. U. S., 22 Fed. (2d) 547, announce the proposition that an inconsistency in the verdict of a jury is grounds for reversal. Macklin v. U. S., 79 Fed. (2d) 756; Coplin v. U. S., 88 Fed. (2d) 652, both decided in the Ninth Circuit, and Dunn v. U. S., 284 U.S. 390, 82 S. Ct. 189, 76 L. Ed. 356, all seem to hold that an inconsistency in the jury's verdict is not grounds for reversal, as did Freeman v. U. S., 96 Fed. (2d) 13, 59 S. Ct. 78, 83 L. Ed. 377, decided by the Fifth Circuit.

In the case of Macklin v. U. S., supra, the defendant was indicted for the violation of two sections of the internal revenue code. The Circuit Court of Appeals held that the gist of the offenses was different in the two sections and that the acquittal on one count would not bar a verdict of guilty on the other. There was no question presented in that case on appeal, as here, as

to whether or not a scheme or artifice to defraud had been devised. The case of Dunn v. U. S., supra, was a prosecution on two counts, one charging the sale of intoxicating liquor and the other the maintenance of a nuisance by allowing liquor to be sold on the premises. That case also held that there was an inconsistency in an acquittal on one count and a conviction on the other, but again no question was presented as to a scheme to defraud. The case of Coplin v. U. S., supra, was a prosecution of several defendants, some twelve or more, charging offenses of mail fraud, Section 77q(a)(2) of Title 15, securities act, and a conspiracy to perpetrate these crimes. The objection raised on appeal was that there was an inconsistency in finding three of the defendants guilty of having placed one phone call and a finding of not guilty on the conspiracy counts. Here the court pointed out that any of the defendants who aided in the placing of the call, or assisted in any way, would be guilty under the Federal Statutes as principals and therefore there would be no inconsistency, although the Court did state the proposition generally that inconsistency in the verdict is not grounds for reversal. Freeman v. United States, supra, was a prosecution under the Mail Fraud Statutes and the Securities act, Section 77q. In that case the Court charged the jury that in order to convict the defendant on any subsequent count, they must first find him guilty on Count One showing a scheme to defraud. The Circuit Court of Appeals refused to reverse the conviction on Counts Two, Three, Four and

Five, holding that they could not assume that the jury brought in a verdict contrary to the express instructions of the Court so they must have found a scheme to defraud but no use of the mails.

The rule regarding inconsistent verdicts is stated in 23 C. J. S., Par. 1403, page 1094, as follows:

> "On the other hand, where the elements of the two offenses are identical, a verdict of not guilty on one count is inconsistent with a verdict of guilty on the other count. When accused is convicted on one count and is acquitted on another count, the test is whether the essential elements in the count wherein the accused is acquitted are identical and necessary to proof of conviction on the guilt count. A verdict which acquits accused of a crime which includes acts necessary to the commission of another crime for which he is found guilty is inconsistent. However, there is no inconsistency in verdicts of acquittal and of conviction on charges of crimes composed of different elements, but arising out of the same state of facts."

In this case we do not have the question presented as to the mailing or the use of the other instrumentalities in interstate commerce. This was admitted by the defendant. (Rec. p. 203) So the sole question presented to the jury was whether or not there was some scheme or artifice to defraud in the sale of the units of trust.

We may assume, as a general proposition, considering the decisions of the Ninth Circuit Court of Appeals, that an inconsistency in a verdict, standing alone, would not be sufficient grounds for reversal. See Macklin v. U. S., Freeman v. U. S., Coplin v. U. S., supra.

However, in the case at bar we have further facts to sustain our position that the inconsistency here is sufficient grounds for reversal.

The charges in the indictment are all based on a single, a same scheme, or artifice to defraud, realleged only by reference as to each Count. All of the evidence was admitted by the trial court, over the objection of the defendant, without requiring the United States to elect or designate as to which charge or charges in the indictment the same was directed. In neither case would the acts of the defendant have been of a criminal nature unless, *in the first instance,* some scheme or artifice to defraud was proved by the United States.

It is to be further noted that only one scheme or artifice to defraud was relied upon as the basis of all the charges contained in the indictments. *Precisely the same evidence to prove all of the charges was introduced by the U. S., over the objection of the defendant and over his insistence that the United States be compelled to designate, or elect, as to which charge, or charges, in the indictment certain evidence was directed.*

Certainly there was nothing in the testimony of Ralph T. Montag to prove any charge in respect to the sale of securities. Montag was never offered any securities; he was, in fact, a silent partner, and was fully informed by the defendant, Suetter, as to what his, Montag's, money was being used for. To the same

effect, the testimony of William Phillips and Father Bubacz proved that neither of them had parted with anything of value to the defendant, Phillip Suetter, in exchange for any units in the Suetter Placer Mines. Yet all of this evidence was admitted over the objection of the defendant and with no attempt by the court to limit this evidence to any particular charge or charges in the indictment.

We therefore submit that the Court erred in failing to dismiss the conviction on Counts Six and Seven because of the inconsistency in the verdict of the jury, or to grant a new trial as to those Counts.

CONCLUSION

The Indictment charges that the defendant, Phillip Suetter, devised a scheme and artifice to defraud and obtained money or property by means of false and fraudulent pretenses, in substance, as follows:

> "1. That the defendant would purchase mining claims in Josephine County, Oregon.
>
> "2. That defendant would declare himself as Trustee of the properties.
>
> "3. That defendant dominated said trust.
>
> "4. That defendant solicited persons to invest in the Suetter Placer Mines.
>
> "5. That defendant so obtained $5000 from W. E. Phillips by fraud.
>
> "6. That defendant, in order to induce persons intended to be defrauded, and in order to enable defendant to convert a large part of the investment

so made, made alluring and specious predictions by means of circulars, telegrams, letters, and other written communications and statements.

"A. That defendant was sole owner of Suetter Placer Mines, when in truth Ralph T. Montag had a one-half interest in and held a mortgage on the mines.

"B. That defendant would keep an accurate set of books, which he failed to do.

"C. That defendant made false representations that employees of the Link-Belt Company would invest $80,000 when, in fact, they had not agreed to do so.

"D. That the money invested in the units would be used for equipment and in the operation of the mines; that the money was not so used, but was converted by the defendant to his own use.

"E. That the defendant knew that the investors would not realize large returns.

"F. That an investment in units was represented by the defendant to be a safe and conservative investment, when in fact it was not.

"G. That defendant represented that he had engineers test the property who had submitted favorable reports, when in fact he had not.

"H. That production would begin by November 1937, and that it did not begin then.

"I. That defendant represented that he had a great deal of practical experience in mining, which he did not have.

"J. That defendant represented that an investment of $300,000.00 would bring returns to the investor of, from one to three million dollars in three years.

"K. That defendant represented that he would commence shipping gold to the mint 90 days after

December 16, 1938.

"L. That dividends from the Suetter Placer Mines would amount to 20% of one hundred million dollars.

"M. That defendant represented that the properties were proven when they were not.

"N. That defendant represented that the investors would not lose when he knew that they would lose.

"O. That defendant represented he had invested $50,000 of his own funds in the mines when he had not."

The testimony and evidence adduced by the United States proved that the defendant, Phillip Suetter, did have title, in his own name, to the Josephine Mines or Norton Mines, in Josephine County, Oregon; that he did execute a Deed of Trust as sole trustee, that he did have control of the properties; that he had solicited persons to invest in the Suetter Placer Mines and sold units therein; that W. E. Phillips had given the defendant, Phillip Suetter, a note for $1,000, which had been returned, by Suetter, to Phillips, and that nothing else of value had ever been given by Phillips to Suetter; that the defendant had never made any particular promises regarding the mines, but did believe that they could be operated profitably with proper equipment; that Suetter had never converted any of the money so invested to his own use; that the predictions as to potential profits were made by Phillips, of the Link-Belt Company; that Ralph T. Montag was a silent partner of the defendant and he knew all about Suetter's efforts to raise money to develop the mines

and acquiesced in and ratified the acts of Suetter; that the defendant kept such books as enabled Government's witness Perry to make an accounting; that the employees of Link-Belt Company had made investments in the mines that had been returned to them; that the money invested in the units was used in buying equipment and in the operation of the mines, and none of the investments so made were used by the defendant personally; that any statements regarding potential profits were based on statements made by Phillips and the Link-Belt Company after they had tested the gravel from the properties; that the investors, particularly Archbishop Beckman and Bishop Rhode, were independently advised, by Phillips and others, as to the potential value; that the investors knew that this was a mining operation with certain elements of chance and that such operation was never represented by Suetter to be a safe investment, but that he *hoped* to return a profit; that there was no representation by Suetter to Bishop Rhode that the property had been tested; that the independent reports of Phillips, and others, were favorable; that there is no proof as to when production was to have begun, and no representations by the defendant that production, of gold, would begin at any particular time; that the defendant had been engaged in mining for some considerable time and had had successful ventures; that there was no representation as to the extent of the returns; that the only representations as to potential profits were independently made by Phil-

lips and the Link-Belt Company, although the defendant, naturally, expected a profit from the operation; that the record contains no statement, nor proof of any kind, that the defendant stated any particular time when he would start shipping gold to the mint, but that defendant did, from time to time, make shipments of gold to the mint; that there is no proof that defendant represented any particular sum or figure to be recovered from the properties; that the only estimate as to the extent of the recovery were the independent statements of Phillips and the Link-Belt Company as to the potential profits from the use of the dredge they planned to sell to Suetter, as contained in Government's exhibit 43 written by the witness, Phillips; that the properties had been worked and tested by the defendant and others; that the defendant hoped to realize a profit, and did expend more than $240,000 in the development of the properties and for equipment; that the defendant had a considerable amount of his own money invested in the mines.

The foregoing is a brief summary of the charges contained in the indictment and the actual proof adduced by the evidence presented by the United States. The evidence discloses that the defendant, Phillip Suetter, had bought the Norton Mines in Josephine County, Oregon. In order to finance the operation he had obtained financial aid from one, Ralph T. Montag, a former partner, and when Montag was unable to further put any money into the development of the mine, Suetter looked for other money to buy the needed ma-

chinery. He was contacted by one, Hogan, who claimed certain connections from whom Hogan could obtain the needed money, and Suetter advanced expense money to enable Hogan to go East. Suetter did not hear from Hogan for some months, and finally located him in Chicago. Hogan had, in the meantime, contacted the Link-Belt Company, and Suetter went to the Link-Belt Company to purchase a modest amount of machinery which he could afford, and saw W. E. Phillips, their sales engineer, who promoted and convinced Suetter that he really needed a certain expensive type of their dredge to work the property properly, costing $250,000.00 and that he, Phillips, would aid and help the old man, Suetter, to obtain the necessary financing for their more expensive equipment. Phillips and the Link-Belt Company ran their own independent tests of the mines, and, based on these tests, made their recommendations to Archbishop Beckman, who in turn, recommended the investment to Bishop Rhode and to other wealthy Catholics, and priests who were thus induced to buy the Archbishop's personal and diocene notes, with which money the archbishop actually later acquired 60% of the properties and "froze" the defendant Suetter out. As a matter of fact, the idea of the trust units was conceived by Phillips in order to assist Suetter to raise the money to buy the $250,000.00 Link-Belt dredge. Phillips sent Suetter to a lawyer in Chicago who drew up the units; Phillips furnished the cut of the dredge displayed on the units; Phillips made a confidential report to the archbishop of a confidental, independent investigation; Phillips

pulled himself, his employers, the Link-Belt Co., and their employees out when he saw the archbishop involving church property in what was really Phillips' scheme and promotion.

With this record before it, the trial Court should have granted the motion for dismissal interposed by the defendant. We believe that we have abundantly pointed out to this Court that there was an entire failure of proof by the United States to substantiate the charges contained in the indictment. The conviction was based only on the charges contained in Counts Six and Seven of the indictment, and we have heretofore pointed out, from the testimony of the witness, Bishop Paul P. Rhode, that the investments made by him in units of the Suetter Placer Mines was based on information that he had received from others than the defendant, Suetter, namely, Archbishop Beckman and Father Bubacz. With this state of the record before it, this Court can well see that the charges of fraud against the defendant were not proved by the prosecution. On the contrary, the record conclusively shows, we believe, that the defendant, as well as the investors, believed that the mines were a legitimate enterprise and that the defendant had invested all of the money he obtained from the sale of the units and otherwise, and more, in the purchase of machinery and other expense in conection with the operation of the mine. There was an absolute failure of proof of any conversion, to his own use by the defendant, Suetter, of any of the money invested by any person.

In the absence of proof that the defendant had conceived some scheme or artifice to defraud there is no basis to substantiate the conviction. As heretofore pointed out in this brief, the entire basis of the charges against the defendant was a single allegation of a scheme to defraud. The verdict of the jury shows that they found no such scheme to defraud because of their acquittal of the defendant on counts One and Two, alleging the same scheme. That, coupled with facts that the alleged indictment letters and other means of interstate commerce were admitted to have been used by the defendant, can leave no doubt as to the inconsistency of the verdict. The further consideration that there was no evidence, and that all of the evidence offered by the United States, and objected to by the defendant, was admitted without segregation or designation, proves conclusively that the verdict of the jury was inconsistent as the convictions were based on precisely the same evidence as the counts upon which the defendant was acquitted.

We therefore respectfully submit that because of such errors in the trial Court this conviction should be set aside and the charges against the defendant dismissed, or the case should be reversed and remanded for a New Trial.

Respectfully submitted,

W. J. Prendergast, Jr.,
David Weinstein.